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Gareth Davies[*]

The country of origin principle requires states to apply different legal regimes to companies and persons according to their state of origin. This looks rather like nationality discrimination, contrary to Article 12 EC. It is also fundamentally at odds with one of the central pillars of citizenship, both national and European; equality between citizens.
The preference for a relatively unfettered country of origin principle in the Services Directive raises doubts whether the directive has an adequate legal basis, and in any case makes it undesirable. It is an example of economic law that has profound impacts on many non-economic aspects of life. It fragments jurisdictions, and therefore societies. Yet it has been made with only the narrowest of trade interests in mind. It shows the danger of allowing technocracy-led legislation.
And nor are the economic arguments even good. If Member States cannot apply their law within their jurisdiction, then their capacity to develop coherent regulatory regimes is undermined, and the competition between these regimes which might revitalise national legislation, to the benefit of economic and non-economic life, cannot take place. The degree of openness of markets is only one part of wealth creation, and so should be part of regulatory competition, not a precondition for it.

1. Introduction

This paper discusses the relationship between the free movement of services and citizenship. Its argument is that they rest on differing conceptual premises, and that as lines blur between categories of activity and person this is becoming not just a contrast, but a conflict. At the heart of this is what is now often called the 'country of origin principle', the idea that cross border economic activity, particularly service provision, should be subject to the regulation of the state of establishment, rather than the state where the service is provided. This can result in different providers on the same territory being subject to different regulation. The resulting inequality is constitutionally and socially – and economically – problematic, and may well be in conflict with the Treaty prohibition of discrimination on grounds of nationality.

In a broad sense, what current developments display is the turbulent coming together of two streams of thought. On the one hand, the economically oriented internal market is led by lawyers and policy-makers who prize ease of regulation and ease of access to markets, and for whom equality is of marginal interest. On the other hand, those trying to give the EU political depth and social substance seek to forge links between EU citizens in different states, shared rights and values which may give a sense of unity and equality, rather than difference and division. When a service provider is also a citizen, he embodies both of these streams, and the conflict between equality and access is given a human face: the Polish plumber.

The paper proceeds as follows: the next two sections outline in more detail the conceptual bases of citizenship and of free movement, or at least those elements relevant to the discussion here.

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Subsequent sections then outline how they interact. Firstly, the free movement of services changes the relationship of citizens to each other. The role of establishment is considered here, and whether the right to establish exacerbates or mitigates the constitutional cost of free movement of services. The issue of 'abuse' of free movement is an element of this. Secondly, free movement of services changes the relationship between the citizen and the state, making it harsher and more distant. Finally, conclusions suggest that while it is free movement that has realised the most concrete policy gains in recent years, there is a limit to what countries and societies can accept, and it may be time for more citizenship-like ideas to assert themselves, even at the cost of market access and free trade. Economics without justice is politically unstable, and may therefore be ultimately economically unsound.

The role of the Services Directive in this cannot be, and is not, ignored.[1] While its contribution to the law remains unclear, it is becoming the accepted framework for discussion of these issues, among the public and non-specialists at least. Its influence on the developments described is therefore addressed where relevant.

2. The nature of citizenship

Citizenship is often associated with rights to political participation, but for many citizens this is but a part, and not necessarily a particularly important part, of what they feel their citizenship entails. There are other rights and privileges associated with citizenship which make a greater contribution to the importance of that status to those who have it. Notable among these, in modern European states, is the right to the protection of the state and the right to its services, most importantly in the areas of health, education and social insurance.[2] Citizenship of a welfare state is life-long membership of a system of social benefits.

Citizenship is also a guarantee of equality.[3] The content of the rights and benefits that national law provides may vary over time, but they are available to all citizens on equal terms. The particular identity of the individual does not affect their rights. As well as this the citizen is entitled to what one may call a 'Most Favoured Person' treatment. Non-citizen members of society may have some of the rights of citizenship, perhaps even all, but they will not have more. The citizen is never second-class. Diplomats are the notable exception to this, but they are indeed exceptional, too exceptional to undermine the general principle of the citizen as most privileged client of the law and the state. The sense of this right

[1] Directive 2006/123/EC on services in the internal market [2006] OJ L 376/36, (27/12/2006). The directive must be implemented by 28th December 2009.

[2] Davies 'The process and side-effects of the harmonisation of European welfare states' Jean Monnet Working Paper 02/06, www.jeanmonnetprogram.org.

[3] The thoughts on citizenship here are largely inspired by reading Barber 'Citizenship, nationalism and the European Union' (2002) 27 ELRev 241; Bosniak 'Citizenship denationalized' (2000) 7 Indiana Journal of Global Law Studies 447 (also on ssrn.com);Hartnell 'Belonging: citizenship and migration in the European Union and Germany' (2006) 24 Berkeley Journal of International Law 330.

to equality gives status to individuals. It confers dignity even on those who in other ways are not successful in their life. In some, even if formal, sense, a citizen cannot be looked down upon.

One of the major effects of citizenship is to provide a sense of place.[4] Formal equality provides a high level of transparency and certainty, and rights to protection and services give a sense of security and obligation, which the state can leverage to further collective ends – taxation or military service, for example. To possess citizenship is to have a form of socio-political fixed abode, convenient for both the denizen and the authority who may wish to address them.

3. The nature of free movement

The legal basis of free movement was traditionally non-discrimination. The Treaty articles concerning the internal market were seen as prohibiting measures which distinguished between national and foreign goods or services, or which were protectionist in effect.[5] However, such an approach does not fully bring down barriers to movement. Over-regulation, or heavy regulation, makes cross-border trade difficult just as it makes domestic trade difficult. There may be no identifiable inequality of effect, but there is a general suppression of economic activity. The desire to achieve the broader economic aims of the internal market, to stimulate the growth of cross-border industry and achieve economies of scale, led to an adjustment in the interpretation of the Treaty articles. While this remains ongoing and controversial, the idea of removing barriers to market access *per se*, irrespective of whether they had any disparate or protectionist effect, attracted academic and, to a lesser but still significant extent, judicial support.[6]

The country of origin principle is a way of achieving this. If actors are only subject to the regulation of their state of origin, and the standards prevailing in their state of activity are not applied to them, then cross-border economic activity becomes a great deal easier. It is this principle that was recognised in *Cassis de Dijon*,[7] and that under the name of 'mutual recognition' has been accepted as a general rule of Community law.

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[4] Ibid.

[5] See Gormley (ed) *Kapteyn and Verloren, Introduction to the Law of the European Communities* at 625 (goods), 737-8 (establishment), 756 (services); Directive 70/50; Marenco 'Pour une interpretation traditionelle de la notion de mesure d'effet equivalent a une restriction quantitative' (1984) Cahiers du Droit Europeen 291; Case C-379/92 *Peralta* [1994] ECR I-3453.

[6] See Weatherill 'After Keck: some thoughts on how to clarify the clarification' (1996) 33 CMLRev 885; Barnard 'Fitting the remaining pieces into the goods and persons jigsaw' (2001) 26 ELRev 35; Woods *Free Movement of Goods and Services within the European Community* (Ashgate, 2004) at 209-218 (for an overview rather than advocacy of the developments); A-G Jacobs in Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179 (but c.f. A-G Tesauro in Case C-292/92 *Hunermund* [1993] ECR I-6787); Case C-76/90 *Säger v Dennemeyer* [1991] ECR I-4221; Case 8/74 *Dassonville* [1974] ECR 837 but c.f. Case C-267/91 *Keck* [1993] ECR I-6097. For criticism of a market access approach see Snell *Free Movement of Goods and Services in EC Law* (OUP, 2002); Davies *Nationality Discrimination in the European Internal Market* (Kluwer Law International, 2003).

[7] Case 120/78 *Cassis de Dijon* [1979] ECR 649.

It is the exceptions to the principle that then become important. If the country of origin principle (or mutual recognition) is applied only to the extent that regulation in the state of origin is broadly functionally equivalent to regulation in the host state, then the principle is no more than a rule of substantive non-discrimination, and should not be controversial. However, if it is applied beyond this, with the only condition being that the regulation of the state of origin is *adequate*, not that it offers the same standards as the host state, then the rule goes beyond equality, and enables foreign providers to operate at a lower quality than their domestic competitors. It creates substantive reverse discrimination.

In reality, there is a great deal of artificiality in discussion of the equivalence of different regulations. Almost all differences can be interpreted as in some sense differences of quality, suggesting that almost any application of the country of origin principle or mutual recognition goes beyond discrimination. On the other hand, sensible rules of legal practice such as proportionality demand that minor differences should not be allowed to prevent acceptance of substantially similar standards. Thus a broader view of equivalence allows most mutual recognition to be fitted within a substantive equality framework. The correct view of what is equivalent is of course a sensitive and difficult politico-legal question, the subject of much discussion.[8]

Not the smallest problem is the question of ownership of the issue; should it be the pedantic and highly regulated state which itself decides which foreign rules are equivalent – of course it will find that none are – or should it be the central Community authorities, achieving thereby free movement at the cost of respect for local democracy and choice?[9]

In recent years the terminology of the discussion has been broadened to include an idea borrowed from economics, that of 'regulatory competition'.[10] Allowing trade between jurisdictions with different laws is thought to exert the same evolutionary pressures on legal systems and regulatory structures as it does on companies within a single market. Most discussion of this then suggests that local regulatory autonomy – rather than harmonisation – should be combined with a relatively strict country of origin rule. Each state may therefore have its own standards, but foreign traders in their market will not be subject to them. As a result, economic actors will relocate to states with the most attractive regulation, forcing states to create laws supportive of wealth creation, and hence, it is hoped, increasing total

[8] See Alter and Meunier-Aitsahalia 'Judicial politics in the European Community: European integration and the pathbreaking Cassis de Dijon decision' (1994) 26 Comparative Political Studies 535; von Heydebrand u.d. Lasa 'Free movement of foodstuffs, consumer protection, and food standards in the European Community: has the Court of Justice got it wrong?' (1991)16 ELRev 391; Case 261/81 *Rau* [1982] ECR 3961.

[9] Davies 'Abstractness and concreteness in the preliminary reference procedure' in Nic Shuibhne (ed) *Regulating the Internal Market* (Edward Elgar, 2006), also available as 'The division of powers between the European Court of Justice and national courts' on ssrn.com.

[10] See e.g. Barnard and Deakin 'Market access and regulatory competition' in Barnard and Deakin (eds) *The Law of the European Single Market*; Reich 'Competition between legal orders: a new paradigm of EC law?' (1992) 29 CMLRev 459; Ogus 'Competition between national legal systems: a contribution of economic analysis to comparative law' (1999) 48 ICLQ 405; Deakin 'Legal diversity and regulatory competition: which model for Europe?' (2006) 12 ELJ 440; Søndergaard Birkmose 'Regulatory competition and the European harmonisation process' [2006] EBLRev 1075.

wealth. Issues of equity are not forgotten here: of course, there is a risk that laws friendly to businesses might have other, less attractive side effects. It will be for each state to make this trade-off under its domestic democratic processes.

Differences between the laws in different states are, from this perspective, no longer just obstacles which the law of free movement exists to overcome. Rather, they are part of the reason why the law of free movement exists. The diversity is a potential source of improvement, and free movement is part of a mechanism for achieving this. Free movement law then exists to take advantage of diversity, instead of to compensate for it.

The difficulty with this perspective is justifying why foreign traders should be excluded from the application of local laws. This makes trade easier, and prevents protectionism, and so may serve economic and market-opening goals. However, the question to which there is not yet fully an answer is the more constitutional one; is it fair or just? Can the global welfare increase resulting from trade, openness and competition justify the micro-scale inequality between traders which results from a broad country of origin principle?

An additional criticism is that in reality states will be forced to lower their standards to attract businesses, so that other interests will be subjected to those of manufacturers or service providers.[11] This is a macro-argument, which meets the macro-arguments for the benefits of regulatory competition head on, and doubts them. It is not discussed here. Rather, the subject of the following sections of this paper is whether, even if regulatory competition/the country of origin principle are in many ways beneficial, they are constitutionally tolerable. Can they meet the challenge of individual rights?

4. The potential conflict between services and citizenship: relations between citizens

4.1 Free movement as a source of legal inequality between citizens

If citizenship is premised upon a degree of uniformity, while economic free movement is premised upon diversity, then there is a difference between their conceptual roots. However, this only becomes a conflict if their spheres of application cease to be defined and separate. This is what has happened as a result of the development of the law of free movement.

The process is not new. The granting of specific rights to migrants, notably with respect to third-country family members, but also concerning recognition of qualifications, undermined both formal equality and the most-privileged status of national citizens in their own land.[12] As has been commented,

[11] See references in note 10 above.

[12] E.g regulation 1612/68; Case 340/89 *Vlassopoulou* [1991] ECR 2357. See for critical approaches, Nic Shuibhne 'Free movement of persons and the wholly internal rule: time to move on?' (2002) 39 CMLRev 731; Gaja 'Discrimination a rebours' in Dony (ed) *Melanges Waelbroeck* (Bruylant, 1999); Maduro 'The scope of European remedies: the case of purely internal situations and reverse discrimination' in Kilpatrick, Novitz and Skidmore (eds) *The Future of Remedies in Europe* (OUP, 2000).

it created a new cosmopolitan legal elite.[13] The migrant's power to avoid national law that obstructed them unreasonably set them above domestic citizens and created a form of limited-access judicial review that was alien in both substance and spirit to most legal systems.[14] To some extent this was mitigated by national equality laws which rejected such class-based treatment, and so extended Community rights to national citizens.[15] However this process was limited and incomplete, varying from state to state.

Nevertheless, whatever the formal inequality resulting from Community law it could generally be conceptually squeezed into a substantive equality jacket.[16] The fact of being a migrant created special disadvantages, which justified migrant-specific treatment aimed at remedying these – allowing them to be with their family, for example, or recognising their foreign qualifications on the basis that in substance they were largely equivalent to domestic ones, and non-recognition would put migrants at a disproportionate disadvantage. The Aristotelian notion of treating like situations alike could be respected by acknowledging that in many respects the situation of a migrant was not like that of a domestic citizen.

This interpretation has been strained by the Court of Justice's tendency to use a more far-reaching rhetoric, which calls for even national laws without disparate impact to be subject to proportionality review where they impact on migrants.[17] It has seemed at times to have a truly deregulatory agenda, treating a lack of disparate impact as irrelevant if national rules obstructed market access. However, the reality is that the rhetoric has exceeded the results. The case law on free movement of services and persons can be overwhelmingly, and most convincingly, understood as an attempt to overcome the specific disadvantages resulting from migration and to give migrants substantive equality in their host states.

The strain is now increasing again, partly as a result of the more recent re-interpretation of the internal market in terms of regulatory competition. At first glance, and in some contexts, this too can be understood in terms of substantive equality. While the essence of regulatory competition is that different laws impose different costs and constraints on economic activity, the legitimation for it is, sometimes at least, that the degree of protection of important non-economic interests, at least as

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[13] See Bernard 'Discrimination and free movement' (1996) 45 ICLQ 82.
[14] C.f. Spaventa's conclusions in 'From *Gebhard* to *Carpenter*. Towards a (non)economic European constitution' (2004) 41 CMLRev 743. On free movement law as judicial review see also Dougan 'The constitutional dimension to the case law on Union citizenship' (2006) 31 ELRev 613.
[15] The explanation for case C-448/98 *Guimont* [2000] ECR I-10663 and quite possibly Case C-268/91 *Keck* [1993] ECR I-6097.
[16] See Davies *Nationality Discrimination*, note 6 above, at 130-137.
[17] Case C-55/94 *Gebhard* [1995] ECR I-4165; Case C-76/90 *Säger* [1991] ECR I-4221; Case C-415/93 *Bosman* [1995] ECR I-4291; Case C-60/00 *Carpenter* [2002] ECR I-6279. See for an up-to-date account of developments in services Meulman and de Waele 'A retreat from *Säger*?' (2006) 33 LIEI 207.

embodied in the product, is largely the same.[18] The choice is between paths of varying efficiency to a common destination. However, this breaks down where the non-economic and the economic interests coincide; where the greater or lesser cost burden also becomes a question of justice beyond the narrowly economic.[19] That occurs in the person of service providers, the reason why these were the centre of outrage in the French referendum campaign in 2005. An individual who is present in the jurisdiction but not subject to its regulation, and operating under a more beneficial regime, is a direct challenge to the content of citizenship – national or European - and its associated guarantees of equality and privilege. His domestic competitor sees his most privileged position as a national citizen undermined, while the two competitors, working side by side, operate under different legal regimes with different rights, despite a shared EU citizenship. The regulation of competition, a matter of economic law, is here inseparable from individual rights. The idea of the level playing field and fair competition, already present in Community law, becomes also a question of the equality of individuals before the law.[20]

4.2 The country of origin principle in the Treaty and Directive

As a result of Article 49 a Member State can apply its domestic regulation to a service provider when this would serve a legitimate aim and be proportionate.[21] Important elements of deciding what is proportionate include whether the aims could be achieved in a less trade-disruptive way (if so, there is a suspicion either of protectionism or of bad regulation); whether the interests the regulation protects are already protected by rules in the state of origin (then application would be double regulation and unfair, as well as a denial of mutual recognition) and; whether the services are being provided structurally via establishment or intermittently (it is unreasonable to make the same demands of a temporary visitor as of one establishing in the territory).[22] This is fairly open-ended law, and it would be possible to interpret it to create a far-reaching country of origin rule, by finding most applications disproportionate. In practice, the law has overwhelmingly been used until now to remove discrimination against migrants, by preventing situations where they were subject to double regulation, or were asked to comply with rules that would present particular difficulties for them, while serving only a marginal purpose.

Article 16 of the directive however goes further. Instead of requiring simply that national requirements must serve a legitimate aim, and leaving that list of aims open, it transforms it into a

[18] See Weiler 'The Constitution of the Common Market Place' in Craig and de Burca (eds) *The Evolution of EU Law* (OUP, 1999).
[19] See Davies 'Is mutual recognition an alternative to harmonization?' at 273, in Bartels and Ortino (eds) *Regional Trade Agrements and the WTO Legal System* (OUP, 2006).
[20] If companies in two different states compete, as a result of services supplied at a distance, there is also an argument that it is unfair that one suffers a lighter regulatory burden. However, the argument is less pressing - because they are companies, and because they are in different jurisdictions.
[21] *Gebhard*, *Säger*, supra; Case 33/74 *van Binsbergen* [1974] ECR 1299; Woods, note 6 above at 193-198.
[22] Woods, ibid; Case 279/80 *Webb* [1981] ECR 3305; Case C-58/98 *Corsten* [2000] ECR I-7919.

closed and brief one.[23] National regulation concerning service activities can only be applied to migrant service providers (the article does not deal with established persons) when this is necessary for public policy, public security, public health or the protection of the environment. Other purposes, such as consumer protection, or the protection of the reputation of industries or professions, or the prevention of unfair competition, however sensible they might be, are not acceptable reasons to impose domestic law. The country of origin principle therefore acquires teeth. The presumption is that service providers are exempt, above the law of the territory where they operate, and the rebuttal of that presumption is hard. The situation where competing service providers on a territory are subject to different legal regimes – that they essentially bring their own legal regime with them – becomes the usual one, with all the associated challenges to equality and competition norms, discussed further below.

Any conclusions about the directive must be seen from the perspective of its limited application. Not only is it subordinate to all other secondary legislation, but many important services, such as healthcare, financial services, transport, temporary work agencies, and social services are excluded from its scope. Equally excluded are certain areas of law – taxation and employment law, notably. It may be hard to think of any requirements that need to be imposed or interests that need to be protected that the directive actually applies to. No doubt, however, some will arise. In that case, the exemption of the foreigner from these will offend their domestic peer, and questions about the logic and legality of the country of origin principle and Article 16 will have to be addressed.

4.3 Is the country of origin principle compatible with Article 12 and Article 3(g)?

The point above is that a country of origin principle can create inequality between domestic and foreign service providers, by exempting the latter from local law. This inequality can, depending on the circumstances, be greater than the inequality in the other direction which would arise if a 'when in Rome' national treatment rule was followed.[24] The question now is whether such country of origin-created inequality is to be seen as simply an unavoidable, perhaps even desirable, effect of trade, or whether it conflicts with other principles of Community law.

For many policy makers, the inequality is precisely the advantage of a country of origin rule. It is an important driver of regulatory competition, forcing economic actors to seek out the best regulatory environment. To criticise it on these grounds would, for them, be to misunderstand the essence of the internal market, and the intention which it embodies to use competitive forces to drive improvement. Their criticisms are forceful, but here they are, it is suggested, beside the point. Rather like human

[23] Article 16(1)(b) of Directive 2006/123, note 1 above. See generally Davies 'The services directive: extending the country of origin principle and reforming public administration' (2007) 32 ELRev, forthcoming April 2007.
[24] The 'when in Rome' description is taken from Nicolaidis and Schaffer 'Transnational mutual recognition regimes: governance without global government' (2005) 68 LCP 263.

rights, the prohibition of nationality discrimination in Article 12 EC is not dependent upon whether the result of its application is wealth-creating. It is a basic value of the Community, and the challenge it sets is for Member States and Community actors to achieve their goals within its limits, rather than to balance it against these other goals. The following argument, a legal one, proceeds from this starting point. The conventional position of the Court of Justice has always been that Member States are free to discriminate against their own citizens, so long as they do not discriminate against migrants.[25] However, a closer reading reveals this is not an embracing of discrimination by the Court, but the result of jurisdictional issues.[26] Article 49, like the other free movement articles, only applies to cross-border activities. When all the facts of a case are within a single state it is simply outside the scope of Community law, at least as applied by courts using the Treaty articles. The treatment of domestic providers by their own state is no more within Article 49 then the provision of services within China is. The Court cannot hear the case, and national judges have no obligation to apply Community law to it (although they may apply it by analogy, if national law requires this).[27]

However, this does not fully answer the country of origin problem. Questions still remain. One is whether, in applying Article 49 to foreign service providers, the Court is bound to interpret that Article in compliance with Article 12. This seems to be obviously the case; it is a general principle which applies throughout the scope of Community law. But then, what is an interpretation of Article 49 which is in compliance with the principle of non-discrimination? The most obvious answer is that Article 49 may not be read in a way which provides advantage or disadvantage on the basis of nationality. Alternatively, one might say that Article 49 must be read in a way that promotes the equality of nationalities, and reduces differences on the basis of nationality.

So far, so uncontroversial, it is hoped. However, it could be argued that to read Article 49 to give positive advantage to migrants is not a discriminatory reading, because they cannot be compared with their domestic peers, because these are outside the scope of Community law. A situation can only be called discrimination when both parties in the comparison fall within that scope. This however, is clearly wrong. There are numerous cases where migrants have succeeded on the basis that they were disadvantaged relative to nationals, even though those nationals were themselves outside the scope of Community law.[28] Thus it is manifestly not the case that the position of those outside Community law cannot be used in establishing whether discrimination occurs.

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[25] E.g. Case C-64/96 *Uecker and Jacquet* [1997] ECR I-3171; Case C-108/98 *RI-SAN* [1999] ECR I-5219; Case 98/86 *Mathot* [1987] ECR 809 Case C-112/91 *Werner* [1993] ECR I-429; C-98/85 *Bertini* [1986] ECR 1985.
[26] See Nic Shuibhne, note 12 above; Snell, note 6 above at 45.
[27] See *Guimont*, note 15 above.
[28] All cases relying on discrimination in fact, e.g. Case 152/73 *Sotgiu* [1974] ECR 153; Case 186/87 *Cowan* [1989] ECR 195; Case C-274/96 *Bickel and Franz* [1998] ECR I-7637.

The position is therefore this: whether there is discrimination on grounds of nationality, as referred to in Article 12 EC, is independent of issues of scope. The scope of Community law is a jurisdictional concept determining which cases and whose complaints may be adjudicated by the Court, or what legislative measures may be taken. However, factors and circumstances outside the scope of Community law may manifestly be relevant to the outcome of that adjudication.

If the Court then interprets Article 49 in a way that creates positive advantages for migrants, it is interpreting it in a discriminatory way. There are limitations and nuances on this. The power of courts merely to apply or disapply means they often have to choose the lesser of evils. Many apparent advantages for migrants can be understood as in fact redressing disadvantages that they would often have. However, this is not always the case. A strong country of origin principle, which allows migrant service providers to operate irrespective of local law, irrespective of whether home state law regulates equivalent matters, and irrespective of whether it would in fact be difficult for them to comply with local law, cannot be read into Article 49 without violating Article 12. In other words, Article 49 cannot go 'beyond discrimination' into 'market access' because this is going into 'reverse discrimination', which is still discrimination. It is merely the case that the victims have no standing to sue. However, as an institution bound by general principles of law the Court should not be guided in its interpretations by whether anyone has legal standing to complain. It should, in all its actions, attempt to promote and maintain equality between nationalities, and interpret law accordingly.

A similar argument arriving at the same end considers the internal situation and the nature of discrimination. The Court might perhaps argue that it, or Community law, does not discriminate, because discrimination requires a common source of treatment for both advantaged and disadvantaged persons, and Article 49 provides no jurisdiction over those in internal situations. However, in interpreting that article under the preliminary reference procedure the Court is not directly deciding cases, but providing instructions to national judges, which they then apply in the national context. These judges do have jurisdiction over internal situations. If the Court interprets Article 49 in a radical way it is instructing national judges to discriminate – to treat differently according to origin. If Community law and institutions cannot themselves discriminate, it seems fairly clear that they also cannot instruct others to do so, or place them in a position where they are legally obliged to do so.

There may be another way out. The assessment of equality in this context would be nightmarishly complex and factual. When would compliance with local rules be particularly difficult, which burdens are heavier than others? Deciding the *de facto* effects of a country of origin rule, which is what an equality-respecting reading of free movement requires, might well go beyond the competence of courts. There is perhaps therefore a defence to be made of a marginal review, or of use of a rule of thumb. One might say, following *Cassis*, that the country of origin principle is the starting point, because

generally this will be a step towards equality, and it is only when there is overwhelming evidence that it works to the contrary that it should be set aside. However, even this principle is not accepted by the Court. It does not consider the relative positions of competitors at all, merely consumer interests – and even these are removed by Article 16.

This could all come before the Court. National legislation might permit competitors to sue each other on the basis of unfair competition, or unfair competition might be prohibited *per se*, or there might be a national rule prohibiting discrimination on grounds of nationality. A domestic trader might bring an action before a domestic court against a competitor, or more likely domestic authorities, saying 'you cannot apply this rule to me, and not to him, because we are both competing in the same jurisdiction, and that violates equality and/or fair competition rules'. A domestic judge might refer the question to the Court of Justice:

> 'Does Article 49 EC and/or Article 16 of the directive oblige a Member State to exempt a migrant provider of services from reasonable and proportionate domestic legal requirements applicable to providers of those services, when (a) no equivalent regulation is present under the home state law,
> (b) compliance with the requirements would not comprise a greater burden for the migrant than it does for domestic providers, and
> (c) the effect of the exemption is to place the migrant provider at a significant advantage over the domestic provider on the domestic market?
>
> If so, are Member States therefore obliged by Article 49 EC or Article 16 of the directive to set aside domestic legal provisions guaranteeing the equality of all traders and individuals before the law, and to discriminate between service providers according to the nationality of their company or commercial entity?'

It is suggested that it would be difficult for the Court of Justice to provide an affirmative answer while still claiming to respect Article 12. It would be instructing a national court to discriminate formally on the basis of origin, and to do so even if that formal discrimination amounted also to substantive discrimination.[29]

The logic of this situation is also quite different from those that have arisen until now. When cases have been brought in which it is asked whether Community free movement-related rights apply domestically the Court has always replied that Member States are free to discriminate against their own nationals. However, the implicit message is that if they choose they could also grant their nationals the same rights as migrants – it is a matter for them. The Court is not approving discrimination, but deferring to its own limited competence and recognising that this problem is one for the Member States to solve, if they so wish. However, in the cases until now that has always been a realistic possibility. Several have concerned the right of migrants to bring their third country family members to

[29] The analogue situation in another context would be a male worker wishing to protest a rule which tends to disadvantage women, and so is indirectly discriminatory, but in fact also disadvantages him too. To deny this would also be discrimination, by the adjudicating authority, who would hear the case from a woman. The abstract issue is discussed in Davies 'Should Diagonal Discrimination Claims be Allowed?' (2005) 25:2 Legal Studies 181.

live with them.[30] There is no logical or principled reason why Member States could not grant the same rights domestically if they so wished. Other cases have concerned product standards which the Court found to be unnecessary or disproportionate.[31] Given that finding, it follows that there would be no particular problem with the Member State removing the standard domestically too, and replacing it by an information requirement, as the Court usually suggests.[32] No important interest would be threatened: or at least that is the premise of the Court's reasoning, whether or not we always agree on the facts.

By contrast, domestic providers cannot be granted a general exemption from domestic regulation of their activity. This would leave them entirely unregulated. Not only is this obviously unrealistic and undesirable, but the premise of a country of origin based system is that everyone is regulated in one state. Thus when a broad country of origin rule is applied, beyond remedying discrimination, it cannot be retorted, as hitherto could be, that Member States can always, if they wish, extend the same rights domestically as Community law grants to migrants. Nor can Member States realistically change their domestic regulation to make it equivalent to that of the state of origin of the service providers, or at least where they can, they do so by abandoning other interests which they regard as important, whether to do with employment protection, the security of businesses, the skill of service providers, or the contribution of economic actors to taxation and broader society. To demand, even suggest, such a substantive change in domestic law goes beyond the 'different but equivalent' proposition that can more or less plausibly justify a *Cassis*-type ruling, and is neither practical nor legitimate for a court applying Article 49. Therefore a strict country of origin rule not only creates discrimination, but it creates, in reality, irremediable discrimination. It is, one would think, *a fortiori* a prohibited reading of Article 49.

This is all mitigated by the use of mandatory requirements, which give the Court sufficient flexibility to prevent Article 49 becoming radically deregulatory, whether or not it chooses to make this part of its explicit reasoning. However, the directive raises new issues. Within its limited scope it appears to allow fewer derogations from the country of origin rule. The point is not beyond argument,[33] but on balance it restricts these derogations to the closed list of 16(1)(b), mentioned above, rather than the open-ended list of justifications that cases acknowledge. Thus the directive both makes it more likely that significant discrimination against domestic providers will occur, and contains no measures to prevent this (unless equality is a part of public policy. This is a very sympathetic possibility,

[30] Case C-64/96 *Uecker and Jacquet* [1997] ECR I-3171; Case 35/82 *Morson and Jhanjan* [1982] ECR 3723; Case C-370/90 *Surinder Singh* [1992] ECR I-4265.
[31] Case C98/86 *Mathot* [1987] ECR 809; Case C-448/98 Guimont [2000] ECR I-10663; Case C-14/00 *Commission v Italy* [2003] ECR I-513.
[32] Ibid; Case 120/78 *Cassis de Dijon* [1979] ECR 649. On information requirements generally Radeideh Fair *Trading in EC Law: Information and Consumer Choice in the Internal Market* (Europa, 2005).
[33] See Davies 'The services directive' note 23 above.

but one rather at odds with the tradition of interpretation of public policy so far. It will not be further pursued.).

It seems that Article 16, where it applies, simply entrenches a regulatory competition based view of free movement, with no awareness or respect for the constitutional principle of equality as embodied in Article 12. It treats free movement of services as a technocratic wealth-creation policy, forgetting that human beings may be involved, and that they have rights which cannot be violated for purely economic ends. It would be possible to have much discussion about how non-discrimination should be built into a services policy, and no doubt there are differing ways and difficult questions, but to simply ignore it entirely and embrace a system in which the regulatory burden is different for persons of different origin, even though they are operating in the same circumstances, without any room for adjustment to take account of the effects of this, seems indefensible. Nor can the legislator plead, as perhaps courts can, that these questions are too difficult, too factual, for them. Precisely the purpose of secondary legislation is often to enable policy to take account of considerations which courts are ill-suited to address. When the legislation does no more than copy the courts it is not only perhaps a violation of proportionality – since it serves no purpose – but also a misunderstanding of what the legislator is for.

An additional problem is Article 95, which permits harmonisation in order to, among other reasons, remove distortions of competition. These are said to occur by the Court when differences between national regulatory regimes create appreciable advantages or disadvantages for companies according to where they are located, by imposing appreciably greater or lesser regulatory burdens or costs.[34] While there is no obligation to harmonise to remove all distortions of competition, and indeed this is both unfeasible, and in the eyes of most also undesirable,[35] it is far from clear that Article 95 – or any other article – can be used to create such distortions. At the very least, it is arguable that any measure whose legal basis is Article 95 must either diminish or have no effect on such distortions. At the strongest, it could be argued that since Article 3(g) provides that there will be a system to ensure competition in the internal market is not distorted, any measure, taken under any legal basis, which in fact accentuates or creates distortions of competition is contrary to Community law: it is not ridiculous to suggest that different policies and Treaty articles should be interpreted to respect each other, at least so far as possible, and not be used to contradict each other. *A fortiori* when both legal bases are part of the internal market. That is the case here. The directive is based on Articles 47 and 55, concerning the free movement of services and establishment. It is therefore suggested that it should, in order to be a defensible use of these articles, interpret free movement in a way that is not distortive, in the Community law sense, of competition. In practice that would mean taking into account the same

[34] Case C-376/98 *Tobacco Advertising* [2000] ECR I-8419.
[35] See e.g. Ogus, note 10 above, and note 10 above generally; Usher, annotation of Tobacco Advertising, (2001) 38 CMLRev 1519; Davies 'Subsidiarity: the wrong idea, in the wrong place, at the wrong time' (2006) 43 CMLRev 63.

considerations as under Article 12: does the measure tend to equalise the regulatory burdens of competitors, or increase the difference between them?

Perhaps an important missing step in the argument above is consideration of the fact that the service provider is temporarily in the host state. Otherwise he would be established, and fall under other Treaty and directive provisions, where there is a greater respect for host state regulation. Using the classical language of discrimination one might say that therefore he is in a different position from his domestic competitor, and may therefore be treated differently. To treat those who are different in the same way is to increase, rather than decrease, inequality.

Undoubtedly this is often true, and is why not every application of country of origin or mutual recognition rules is objectionable. However, for many services and many service providers a great deal of costs may derive from the activity itself, rather than say infrastructure or marketing costs in the place of establishment. The two plumbers may not actually be in a particularly different position when it comes to deciding which regulatory burden should be placed upon them. It is, in any case, a question of fact whether the differences in position are such that formally identical treatment would increase inequality to a significant extent, and this is the question which cannot simply be ignored. Thus the temporariness of the service provider may well be relevant to considerations, but it cannot be *per se* decisive without abandoning a substantive reading of Article 12.

An additional point is that we are likely to see in the near future – following both enlargement and the current policy emphasis on services, as well as recent case law of the Court on company migration – a growth in strategic establishment, whereby the state of establishment is not the primary market. Service providers may then be temporary in the sense that they are established elsewhere, but they may well be permanently and significantly active on the host market.[36] This undermines their claim to be treated differently. At the moment discussion of this is put under the label of 'abuse', considered below, with the question being whether such establishment should be permitted. As will be seen, the matter is problematic. To some extent these problems could be avoided by a greater willingness to abandon the country of origin rule and subject service providers to the law of the host state. This would mitigate the competition distorting, and inequality-creating, effects of such strategic establishment.

5. The role of establishment

Freedom of establishment and free movement of services are now corollaries of each other. Freedom of establishment may originally have been intended to allow service providers to establish themselves in foreign markets. The concept may have been that where services were provided regularly or

[36] Case C-215/01 *Schnitzer* [2003] ECR I-14847; Hatzopoulos and Do 'The case law of the ECJ concerning the free provision of services: 2000-2005' (2006) 43 CMLRev 923 at 927-930.

systematically, a company or individual would then wish to establish a base in that jurisdiction. However, it is increasingly the case that a company or individual may wish to establish in the state with the most beneficial regulation, while providing the bulk of their services elsewhere. As a result of increasing mobility and the changing nature of services, with more provided at a distance, place of establishment and place of earning have become decoupled, and recent case law indicates that free movement law largely allows, even encourages this.[37]

The consequence of this is that it is possible for service providers to choose the authority that governs their actions, while operating in all jurisdictions. The link between law and territory is notably weakened. National regulators become more like professional bodies to which individuals are affiliated. The basis of the authority over the individual is that affiliation, to a greater extent than any physical location. Freedom of establishment is therefore the motor behind free movement of services, and the country of origin principle would add to the power of this motor. It would not just be the Polish company expanding into new markets that would be the problem, but the German or French company migrating to Poland in order to serve its German and French clients from a lower-cost base. A broad country of origin principle without further restrictions on establishment or services would render this kind of strategic, and often nominal, establishment ubiquitous.

There are therefore two questions which arise. One is when such establishment can be regarded as an 'abuse' of free movement, so that the company can no longer rely on Articles 43.[38] The right to establishment might simply not extend to this kind of simple avoidance of local regulatory burdens. The other question is when, even if the establishment is legitimate, a Member State can nevertheless subject the company to its local laws when it provides local services, i.e. the extent to which it can avoid an unmitigated country of origin principle using an abuse-type argument.

An important starting point is the confirmation that even a structural provision of services remains services. A company that provides constant and regular services in another state does not thereby cease to fall within Article 49. Although the Court has suggested that Article 49 encompasses temporary or short-lived provision – by contrast with establishment – nevertheless it can be regular and even intense. [39] Sheer amount of clients or business in another state will not in itself make a company established there, absent infrastructure or locally based employees or other factors.

Nevertheless, when the purpose or effect of establishment in another state is to avoid legitimate regulation in the state of service provision, the Court acknowledges that this could be 'abuse' which a

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[37] Case C-212/97 *Centros* [1999] ECR I-1459; Case C-147/03 *Commission v Austria* [2005] ECR I-5969; Engsig Sørensen, 'Abuse of Rights in Community Law: A Principle of Substance or Merely Rhetoric?' (2006) 43 CMLRev 423 at 444-445.

[38] On abuse see: Engsig Sørensen 'Abuse of Rights in Community Law: A Principle of Substance or Merely Rhetoric?' (2006) 43 CMLRev 423; Kjellgren 'On the border of abuse – the jurisprudence of the European Court of Justice on Cirvumvention, Fraud and other Misuses of Community Law' [2000] EBLRev 179.

[39] Note 36 above.

Member State would be justified in taking measures against.[40] In one case, it even found that it would be legitimate to treat the company as in fact a domestic company, since while established abroad its business was exclusively in the state in question.[41] Yet the law which the Netherlands wished to apply to the foreign-based company was aimed at the protection of media pluralism. There was no suggestion that the company should be subject to the full spectrum of Dutch domestic law, from labour regulation to tax. Thus the suggestion that establishment abroad could be deemed not to have happened is somewhat misleading. Rather, the Court allowed the Dutch to apply a law which they found protected a legitimate interest in a proportionate way.

This is consistent with the other cases on abuse and U-turn constructions. While the Court may use diverse phraseology, it is clear that applying the domestic law is a derogation from the starting point of free movement, and will be permitted only when justified and proportionate.[42] In other words, the abuse cases do not add much to the general principles of free movement of services. If a company locates to a state whose laws allow it to operate in a way which threatens an important interest in the state of provision then that state may take proportionate measures to prevent this, namely apply its national laws to that service provider in derogation from the country of origin principle. However the principle remains that foreign law should be treated as adequate, and so it is for the state of provision to show the need to apply its law. Moreover, establishment abroad because foreign law is more advantageous cannot be treated as a *per se* abuse.[43] This would undermine the purpose and essence of the right to freedom of establishment.[44] It is only when that establishment and provision from the home state threatens a legitimate interest, and when this is the purpose of the establishment, that we can talk of abuse.

The difference is therefore one of intention.[45] Without the intention to avoid national law, any application of that law to the foreign provider would simply fall under the mandatory requirements doctrine of Article 49. With the intention, the same thing happens but a more pejorative label is attached.

This addition of intention to the armoury of the law is of doubtful worth. It is both impractical and unprincipled. It is impractical because establishing the intention of a commercial actor is likely to be a fruitless and often impossible venture.[46] Companies typically act as the result of numerous and changing factors. The Court has suggested that where the company does all its business in one state,

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[40] Case 33/74 *van Binsbergen* [1974] ECR 1299; Case 115/78 *Knoors* 399; Case C-23/93 *TV10* [1994] ECR I-4795; Engsig Sørensen, note 38 above, at 443-444.
[41] *TV10*, ibid. See also Case C-56/96 *VT4* [1997] ECR I-3143.
[42] Engsig Sørensen, note 38 above, at 432-433.
[43] Case C-212/97 *Centros* [1999] ECR I-1459; Case C-147/03 *Commission v Austria* [2005] ECR I-5969.
[44] Ibid.
[45] See Case C-110/99 *Emsland-Stärke* [2000] ECR I-11569, noted by Weber at (2004) 31 LIEI 43.
[46] As with free movement of workers; see Case C-53/81 *Levin* [1982] ECR 1035.

but is established in another, this may suggest an abusive situation, particularly if it migrated from one to the other.[47] However, this apparently simple test is not well adapted to a dynamic business environment. If a firm located in State X because it has attractive law, and then attempts to enter numerous national markets from that base, should its legal position in those markets really depend on how successful it is in each? If it rapidly and successfully enters market Y, before any other, it would seem to comply with the 'abuse' criteria. Yet if it then begins to penetrate Z, P or Q, that would not be the case. Supposing it is very small in Z and P and Q – could it then be argued that these are 'nominal' activities intended to disguise its genuine exclusive focus on Y? While there may sometimes be clear cases, there will be many more unclear ones, and asking whether a company 'intends' primarily to do business in one state while based in another, and thereby avoid the rules of the former, is not a useful or answerable question. Nor is it an appropriate one. If a firm is active on a national market but established elsewhere, then why on earth should the extent to which it is subject to national law depend upon its business strategy? If shortcomings in the home state regulation mean that its activities present a threat to local interests, then application of national law is justified. If that is not the case, then manifestly it is not. There is no logical place for intention.

The underlying confusion seems to be between national laws which regulate the established firm as such – contributions to social funds, labour law, requirements of registration and qualification and security – and laws which regulate the actual service and its provision – the permissible content, form and price of the service, and the competence and qualification of the provider.[48] The first of these provide the major reason for changing place of establishment, and the Court has recognised that this is legitimate.[49] If freedom of establishment exists, then parties have the right to exercise it in their own best interests. However, this should not provide a mechanism for avoiding legitimate and necessary laws of the second type, which could undermine both consumer protection and legal equality. Therefore a state is entitled to ask to what extent its requirements are assured by the laws of the state of establishment. Of course, the two categories are not watertight, with qualifications being a typical cross-over category. It is for the state of establishment to determine what sort of persons may establish in particular functions, and what qualifications they require. However, these matters are directly relevant to the state of provision. Hence, perhaps, recognition of qualifications is dealt with by secondary legislation. It is such areas of law where the appropriate state of regulation is not clear, and justice may require double regulation, that are suitable for harmonisation.

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[47] See Engsig Sørensen, note 38 above, at 443-444; *TV10*, note 40 above; *VT4*, note 41 above; but c.f. Case 79/85 *Segers* [1986] ECR 2375.

[48] See Snell and Andenas 'Exploring the outer limits: restrictions on the free movement of goods and services' at 108-115, in Andenas and Roth (eds) *Services and Free Movement in EU Law* (OUP, 2002).

[49] See note 43 above; Engsig Sørensen, note 38 above, at 445.

Insofar as the directive removes the possibility of relying on mandatory requirements, it undermines the situation above. Abuse then does become an important concept, since it would be only by showing this that a state would be able to apply its domestic laws. The problems of the concept remain however, and are highlighted if it becomes more necessary. Of two companies located in Luxembourg, both doing the same amount of business in the Netherlands, can it really be defended that one is subject to Dutch law and the other is not, because the former has no or negligible business elsewhere, whereas the latter also has significant business in Germany? Apart from the distortions and injustice created on the Dutch market this avoids the fact that a company may locate in a low-burden state in order to avoid the regulation not just of one state but of many. The company in Luxembourg or Ireland may be hoping to avoid the burdens of Germany, France, Italy, Spain, the Netherlands and many other states. Is this in some sense less abusive than the company who only really cares about avoiding the law of one of these?

Abuse is not a useful or enlightening concept when it comes to strategic establishment. In the context of fraud it may have a function – where 'exports' turn out never to have left the country, being resold before they left the warehouse, and suchlike. However, when businesses locate in the place they think best for their business, an attempt to analyse their motives, grade them, and allocate a legal regime accordingly, will not be a step forward for the law.

6. The potential conflict between services and citizenship: the citizen and the state

Many Europeans have a largely service-based understanding of the role of the state in their lives.[50] It provides and guarantees essential, usually welfare, also security and safety, services. The right to this protection is an important part of the citizen-state relationship.

In recent years the tendency has been to privatise the provision of these services, and to give the state apparatus a more regulatory role. There does not seem an immediate likelihood of this trend being reversed in the near future, and indeed in several states, including many of the new Member States, it may still have some way to go.

Privatisation is only a limited liberalising step. It begs the question of which private bodies will be allowed to provide the services, and in many cases systems of authorisation ensure that a small and relatively closed group of providers dominate, for example, healthcare and social insurance. In education the situation is varied, with some states continuing to have dominant public provision, while others have private provision at the centre of their educational system, but within a framework of

[50] This section is based on Davies 'The process and side-effects of the harmonisation of European welfare states' note 2 above at 46-53. See also note 3 above.

regulation that limits the character and diversity of the providers and their capacity to compete with each other.

The law of free movement does not force states to privatise their public services, but if they do so it does provide pressure for them to allow new entrants to the field and prevent an effective cartel of national providers from coming into being. The pressure is limited by factors such as Article 86, and the relationship between free movement of services and liberalisation is a complex and controversial one. Nevertheless, free movement provides a useful tool for a service provider wishing to enter a foreign market for health, education, social insurance, or even security, where the state has in principle conceded that these may be provided by bodies other than the state.

The effect on citizenship is twofold. The diversity of service provision is likely to increase significantly. Whereas many citizens are used to standard forms of education, healthcare provision, and social insurance, the near future is likely to bring change, with questions such as 'what sort of hospital/university/insurance do I want?' becoming realistic ones. The range of practices and service cultures across Europe is large, and that diversity will cease to be so territorially defined. It may become normal for the French citizen to send their child to a school owned by a Finnish educational corporation, to buy their unemployment insurance and pension from a Dutch bank, and go to Austria for some of their healthcare – or to an Austrian hospital operating in France, and bringing with it Austrian approaches to treatment and patient management. The role of the state is here diminished, or at least less apparent. Regulation is less visible than direct provision. It remains to be seen whether the relationship between the citizen and state will be hollowed out, with each feeling more distant from the other and having a consequently lesser sense of obligation, but the possibility is real. The consequences for citizenship are obvious. If what one is a citizen *of* is diminished, so is that citizenship.

The variety of the privatised welfare state also impacts on the citizen's sense of equality. The logic of competition is that there will be better and worse providers and systems – at least better and worse for particular people at particular times. It follows that there will be winners and losers. The inhabitants of a street will turn out not to have all made equally good choices of provider, or to have had the chance to participate in equally good schemes, as a result of the choices made by their employer. The inequality which is already widespread in pensions will extend to the rest of the welfare state.

None of this is to suggest that there is any particular impact on solidarity understood at its simplest. The state can protect the poor by subsidising their purchase of services. Liberalisation does not entail that the poor become the losers. It does however entail that someone does. This challenges more complex notions of solidarity.

It may be noted that the perception effects resulting from liberalisation may be greater than any concretely quantifiable ones. The transfer of responsibility for choice to the citizen which liberalisation

entails is a return of power from the state to the citizen, and in that sense the deletion, or at least rewriting, of a clause in the citizen-state contract. It is not always welcome. With that power comes responsibility and possible consequences for the individual. The transfer of this burden of responsibility may be experienced as a greater diminution of the state-citizen bond - an abandonment by the state, provoking either bitterness or individualism - than any concrete effects on service quality or availability which result.

7. Conclusions

7.1 Equality and the country of origin principle

To provide foreign actors with immunity from national law, when this cannot be explained on equality grounds, is a violation of Article 12 EC, of the competition principles underlying the internal market, and of shared basic notions of justice. A state should not award privileges – or be required to award privileges - to those within its jurisdiction according to their origin, even if it may have to take account of that origin in deciding what genuinely equal treatment is.

That the Court of Justice and many commentators have been able to ignore this for so long is a reflection of the state of the continent and of EU law. There has been so much protectionism and discrimination to go around that, rhetoric apart, there has been little need or chance to use the free movement Treaty articles in other contexts. Faced with resistant Member States perhaps it is understandable that frustrated lawyers have been driven to hyperbolic ambitions, seeking to remove all restrictions to movement, of unequal effect or not.

There is also the natural tendency of the Community policy organs to think in terms of narrow policies. Those concerned with the internal market have no brief to think about constitutional questions, and those adjudicating the internal market will also often see it in economic and technocratic terms. There is even an admirable side to this; the Community has limited competences, and economic law should not be used to invade non-economic terrain.

However, that post seems to be long passed. Free movement is already having significant non-economic impacts, and as it affects welfare, family rights, and economic actors that are citizens rather than corporations, it can no longer be treated as exclusively economic policy. As occurs in domestic law-making and interpretation, economic rules must take account of their wider impact, and sometimes concede precedence to other, higher, norms. It would be a bitter irony if years of legal progress against discrimination on grounds of nationality were followed by its reintroduction through EU law itself.

7.2 Services, citizenship and the state

The capacity to choose the institutions which govern and provide our welfare and our economic activity means that individuals, certainly those who are self-employed and who migrate, will create voluntary networks that provide much of the content that was formerly associated with citizenship. Indeed, it is not obvious that the residual link represented by a passport and a right to vote has more depth or importance than the personal 'regulation-world' governing social and economic aspects of life.

Services and establishment therefore contribute usefully or importantly to the hollowing out of national citizenship begun with Article 12 EC. Scenarios appropriate to a futuristic novel, in which individuals consider themselves to be citizens of X corporation, do not seem entirely unimaginable for the Europe of the near tomorrow.

The most important element of this seems to be the break with territoriality. There is no suggestion in free movement that individuals or companies should be exempt from authority as such, nor that they should cease to have the opportunity or obligation to be embedded in welfare networks, contributing and receiving as appropriate. It is simply likely that the coincidence of all these various structures of protection and authority over a single territory may not be continued, and instead there may be voluntary membership of networks that are not only geographically spread, but not in fact defined geographically at all. The rights and benefits that we associate with citizenship may continue, but may cease to be concentrated in the geographical state.

This is a sensitive and controversial process. To some extent it seems inevitable if the EU does not break down. Even a principle of non-discrimination has many of the effects above. However, pushing the process too fast, and in a way that seems unjust, would seem an effective way to provoke a backlash. The country of origin principle may ironically, if it has this effect, be the rule that saves the nation state.

7.3 The protection of competitors

The change that this paper suggests, and suggests is legally necessary, is a recognition of the rights of competitors: that non-discrimination applies to them too. This is already implicit and explicit in the Treaty as part of the legal understanding of fair and undistorted competition, an element of the internal market.[51] However, this recognition does not seem to have made its way through to negative integration, to the application of the Treaty by courts. This can be seen as a question of direct effect. Perhaps a prohibition on distorting competition is not precise enough for judicial application. However, it is going a step beyond this to interpret free movement so that it positively entrenches such distortions.

[51] For background on competition and competitors see Gerber *Law and Competition in 20th Century Europe* (OUP, 1998); Nihoul 'From unfair trading to fair competition – towards a new organisation of markets in the European Union' (2006) EBLRev 23.

In any case, usually secondary legislation addresses this, compensating for the effects or limits of negative harmonisation. The oddity of the directive is that by contrast it actually entrenches the problems, legislating for distorted competition instead of removing it. If this is supposed to be some kind of subsidiarity-led light legislative touch it is sadly misconceived. Pointless or destructive legislation is a greater violation of principles of efficiency and attribution than law which is longer but achieves more policy goals.

7.4 The country of origin principle as a form of centralisation

If laws required that all cars had the same engine size and shape, then the intensity of competition between manufacturers would in some way increase, as it becomes harder for them to distinguish their products. Fights over comfort and price would become fiercer and more central. Yet it could hardly be said that such law increased competition on the car market, or contributed to the market for cars. By limiting the forms of product and competition possible it would essentially be anti-competitive regulation.

The country of origin principle is a far greater intrusion into national regulatory autonomy than a non-discrimination principle would be.[52] It limits the capacity of states to design and apply legal environments, by requiring 'holes' in national law to be present – for migrants. In regulatory competition it is law that is the product, the subject of the competition. As in the example above, the product is being constrained, with increased intensity of competition along some limited axes – the extent of the cost burden imposed on economic actors, primarily – while competition in other ways is reduced. For example, the state that wishes to impose high standards within its territory, and thinks that by doing so it will in fact attract economic actors and contribute to social and economic success, does not have the chance to try this. A belief that competition can be a useful force for the improvement of law is therefore incompatible with a country of origin principle. Rather, it is necessary to allow Member States maximum freedom to design their regulatory product. The essence of the market is not maximum exchange of goods and services, something that would not be alien to a soviet economy, but the fact that decisions about the production and value of these are made by decentralised actors – it is liberty, rather than trade, which creates a market.

The country of origin principle is therefore a centralising, anti-competitive rule, when imposed by the centre on the periphery. Even though it in some sense adds to the liberty of individuals, it denies them the liberty to act collectively to create new regulatory products – or to define their own liberty. Such a move can only be defended if the state is not seen as the most effective or legitimate vehicle for the expression of collective preferences. Yet even a Europhile could hardly pretend that the EU is a

[52] See Snell, note 6 above; Davies, Nationality Discrimination, note 6 above, at 107-115.

better one. Thus the country of origin principle can only be understood as a statement that voluntary associations – for the law of free movement would also apply to sub-state units were they to impose their own product rules and regulation – have a greater legitimacy than compulsory or geographical ones. This is an intriguing possibility, but a controversial one. It avoids the many issues of solidarity and belonging which are too important to stability and politics to be glossed. The law of free movement hardly seems an appropriate context to impose such a radical sociological manifesto.

7.5 A confusion of principle and pragmatism

The basic principle for determining the law applicable to migrants is obviously that they are subject to the law of the place where they find themselves. Territoriality in this sense remains the cornerstone of democracy, legitimacy, and practical enforcement. Exemption from that law is the exception, which may be justified for various reasons, in various contexts. In the EU, the unreasonableness of many national legal demands, and the protectionist and exclusionary character of much national law and policy has made the case for exemption broader and easier than one might have hoped would be the case.

Nevertheless, one should not forget that the ideal solution is that the conflict between territoriality and migration becomes minimised: that national law becomes reasonable and non-discriminatory so that compliance with it does not prevent movement. Exemption may be a tool to get the ball rolling, or to shock states out of their bad habits and complacency, but it is not a stable or just end-point.

The directive, some case law, and some writing about the internal market, seems to have forgotten basic principles of social organisation and justice, and decided to prize immediate growth in cross-border trade over much more fundamental interests. It has elevated exemption from a widely useful tool to the core principle. Apart from the absence of any democratic or governmental logic to support this, it risks undermining what it sets out to create. A territory without self-governance, the capacity to express its values, or even to enforce its norms, loses its coherence, and is likely to fragment. We may end up not so much opening markets as breaking them down. The barriers to movement, integration, communication and ultimately trade will no longer be along national borders, but they will still exist - between increasingly estranged and isolated sub-groups of the population.